

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 26 October 2021

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to Equality Impact Assessments carried out before the introduction of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, and each amendment to those Regulations.
2. The Commissioner's decision is that Department of Health and Social Care (DHSC) is not entitled to rely on section 35(1)(a) - formulation or development of government policy, to withhold the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the Equality Impact Assessments conducted prior to the introduction of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, and each amendment to those Regulations.
 - Provide the Equality Impact Assessments conducted ahead of the introduction of the Coronavirus Act on 25 March 2020.
 - Any other documentation demonstrating that compliance with the public sector equality duty under Section 149 of the Equality Act 2010 was considered regarding the above-mentioned Regulations and amendments to the Regulations and the Coronavirus Act on 25 March 2020.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High

Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 June 2020, the complainant wrote to DHSC and requested information in the following terms:

"Please provide the following:

- 1. Any Equality Impact Assessments conducted ahead of the introduction of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, and each amendment to those Regulations.*
- 2. Any other documentation demonstrating that compliance with the public sector equality duty under Section 149 of the Equality Act 2010 was considered regarding the above-mentioned Regulations and amendments to the Regulations.*

AND

Please provide the following:

- 1. Any Equality Impact Assessments conducted ahead of the introduction of the Coronavirus Act on 25 March 2020.*
- 2. Any other documentation demonstrating that compliance with the public sector equality duty under Section 149 of the Equality Act 2010 was considered regarding the Coronavirus Act on 25 March 2020."*

6. DHSC responded on 17 July 2020 and confirmed the information was held. However, DHSC refused to provide it citing section 35(1)(a) FOIA as its basis for doing so.
7. Following an internal review DHSC wrote to the complainant on 14 October 2020 and maintained its reliance on section 35.

Scope of the case

8. The complainant contacted the Commissioner on 16 December 2020 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if DHSC is entitled to rely on section 35(1)(a) to withhold the requested information.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

10. Section 35(1)(a) FOIA provides that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to -

(a) the formulation or development of government policy"

11. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
12. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers.
13. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
15. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
16. In its submissions to the Commissioner DHSC explained it considers this information relates to the ongoing development of policy in response to the COVID-19 pandemic. It further explained that at the time of the original request, it was in the process of relaxing restrictions and believed that releasing the requested information

may have prejudiced decision making and negatively influenced public behaviours.

17. DHSC maintained it is still necessary to withhold the documents requested as the Government's response against COVID-19 is still ongoing, and policy development still active, as outlined in the 'COVID-19 Response: Autumn and Winter Plan' publication. As the publication states, 'the Government must continue to monitor the data and prepare contingencies'.
18. This means that, although most restrictions have been removed under Step 4 of the roadmap for easing restrictions, the Government may need to take additional measures to manage the virus during periods of higher risk, such as a mandatory vaccine-only certification policy and legally mandating face coverings in certain settings. Therefore, the information requested remains highly relevant to future policy decisions, particularly what, if any, restrictions should be reintroduced in response to an unsustainable rise in cases of COVID-19 and pressure on the NHS over the autumn and winter.
19. It is clear that the information requested meets the key indicators referred to above and the Commissioner considers that the exemption is engaged.

Public interest test

20. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1) outweighs the public interest in disclosing the information.
21. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed

Public interest arguments in favour of disclosing the information

22. DHSC recognises the public interest in disclosing information to enable the public to understand government policy. In that spirit, it has published documentation demonstrating compliance with the Public Sector Equality Duty (PSED) regarding the introduction of the Coronavirus Act 2020, specifically the Equality Impact Assessment.

23. The Equality Impact Assessment is developed to identify areas for monitoring and mitigation after the decision to introduce a policy is made. The decision to disclose this information was based on the understanding that the provisions included in the Coronavirus Act 2020 would likely exist for a significant period of up to two years, and in some cases longer and, therefore, give sufficient time to monitor and address negative impacts identified in the assessments.
24. The two-monthly reports published on the Coronavirus Act 2020 outline which provisions remain active and explain how these provisions have been used in the previous period.

Public interest arguments in favour of maintaining the exemption

25. The decision to withhold this information is based on the understanding that the Regulations were of temporary application of a matter of months. This means that equality impacts were less readily identifiable and, thus, less amenable to mitigation in the time available.
26. The Coronavirus Act 2020 developed policies for existing services and, therefore, the analytical groundwork had been laid previously. This meant that the policies introduced were more familiar, and the equality assessment documents more suitable for publication.
27. The Regulations, however, included restrictions for which there was no precedent, and, therefore, no historic data points to work from, which meant the related equality assessment was more speculative, and identified broad areas of concern rather than specific impacts.
28. Although the Coronavirus Act 2020 and the Regulations share an objective of managing and mitigating the risks of the COVID-19 pandemic, they differ in their implications for the public. The Coronavirus Act 2020 focused on measures to support the public, businesses and public services, including the NHS, through the pandemic more generally.
29. The Regulations, however, focused on restrictions and related enforcement. DHSC considered that the documents requested relating to the Regulations necessarily describe enforcement risks and differential impacts on the basis of protected characteristics. It therefore does not believe it is within the public interest to publish these documents for the Regulations given this focus.
30. Instead, withholding these documents enables it to continue to work to identify and address impacts on protected groups and avoids the possible risk of enforcement challenges arising from this information becoming public.

31. The DHSC said it understood the complainant may be dissatisfied with the decision to withhold the requested documents for the Regulations. However, several documents that include information relevant to the request are already in the public domain. For example, Public Health England (PHE) published a report on disparities in the risk and outcomes of COVID-19 and the Government has published quarterly reports from the Minister of Equalities and Race Disparity Unit on progress made to address COVID-19 health inequalities. Additionally, as understanding of the virus, restrictions and public behaviour improved, DHSC introduced or amended measures to address some of these inequalities. For example, it introduced support bubbles in June 2020 to mitigate the risk of isolation for single adult households.
32. DHSC maintained that the remaining withheld information remains highly sensitive. It is not in the public interest to reveal information that may compromise the candour of discussion or lead to unwarranted and dangerous anticipation of the direction of policy and related restrictions in response to the status of the COVID-19 pandemic over the autumn and winter period.
33. In addition to the reasons outlined above, DHSC understands the section 35 exemption is intended to ensure the possibility of public exposure does not deter full, candid and proper deliberation of policy formulation and development, including the exploration of all options. Section 35 recognises that the formulation and conduct of future government policy in this area could be negatively impacted by the disclosure of information relating to these discussions.
34. The effective conduct of relations with other departments depends on maintaining trust and confidence. To formulate policy and provide advice, these relationships require the free and frank exchange of information between departments.
35. Civil servants and subject experts need to be able to engage internally in discussion on all policy options in order to expose their merits and possible implications as appropriate. The candour with which this engagement depends will be affected by the assessment of whether the content of such discussions will be disclosed. Premature disclosure of information protected under section 35 could prejudice good working relationships and the neutrality of civil servants. The public interest lies in maintaining free and frank discussion in order to maintain the quality of discussion and effectiveness of the policy decision-making process.
36. Additionally, disclosure of the requested information could make it less likely that individuals comply with Government guidance and

regulations that are designed to slow the transmission of COVID-19 and, therefore, risk greater transmission.

37. For the reasons given, the DHSC believes it is in the public interest to maintain the exemption and withhold the information.

Balance of the public interest

38. A key concern motivating the decision to withhold the requested information is that disclosure is likely to undermine the Government's response to the COVID-19 pandemic and make future policymaking less effective.
39. Although there is strong evidence to support the effectiveness of vaccines in reducing the likelihood of infection leading to hospitalisation or death, vaccines do not fully eradicate the risks of COVID-19. Additionally, some restrictions remain in place, including self-isolation and select international travel restrictions.
40. The uncertainty surrounding the progression of the pandemic over the coming months means this is an area of ongoing and active policymaking. As demonstrated by the Government's 'Autumn and Winter Plan', there is a possibility that further measures may be required to help manage the virus during periods of higher risk. The DHSC believes it is critical that civil servants, subject experts and analysts across departments can engage in proper deliberation of policy formulation and development, without concern for premature disclosure.
41. DHSC identified several documents already in the public domain that evidence compliance with the public sector equality duty for both the Coronavirus Act 2020 and the Regulations. It believes this offers the public access to information that explains and justifies why the decisions were taken.
42. A decision to release further information is likely to undermine the ministerial decision-making process and quality of future policy.

The complainant's position

43. The complainant stated the Health Protection (Coronavirus, Restrictions) (England) Regulations constituted an historic and unprecedented incursion into civil liberties in this country. They were unprecedented in criminalising en-masse previously lawful, everyday behaviours: requiring people to remain in their homes and restricting with whom they could associate.

44. They also considered that the implementation of the various measures provided for in the Coronavirus Regulations had significant equalities implications, in the sense that it would appear that the Regulations had (or, at least, were capable of having) differential impacts upon persons with particular protected characteristics under the Equality Act 2010. It cannot sensibly be doubted that the Coronavirus Regulations, and the processes which led to their formulation and implementation, are matters of the most acute public concern.
45. First, this is information relating to policy decisions which have already been finalised. The Commissioner has consistently recognised that, once the policy formulation process is finalised, the sensitivity of information relating to that process will generally start to wane, and the public interest arguments for protecting the policy process become weaker.
46. The complainant did not believe there was any on-going formulation or development of policy in relation to the Coronavirus Regulations. The Regulations are discrete pieces of legislation, each of which have already been enacted and in some cases subsequently repealed. Therefore, the DHSC cannot argue that the disclosure of the requested information would impact upon the development of policy relating to the (previously enacted) Coronavirus Regulations.
47. Instead, the DHSC appears to be arguing that disclosure of the requested information would affect other, future policy debates. In its refusal decision, the DHSC states that
- "[t]here has been an in depth and ongoing assessment as to the impacts of the Government's policy, including on groups with protected characteristics, and [sic] has informed decision making. The assessments continue to form an active part of the decision-making process going forward."*
48. The DHSC further states that "the section 35 exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development". This is the epitome of a generic chilling effect argument about unspecified future policy debates and should be given no weight.
49. The complainant also noted that the Commissioner and the Information Tribunal have recognised that, in a staged policy development process, there may be 'significant landmarks' after which the sensitivity of information starts to wane. Therefore, the

passage (and repeal) of the various iterations of the Coronavirus Regulations are, self-evidently, such a landmark.

50. Secondly, it is difficult to overstate the public interest in the decision-making process behind the Coronavirus Regulations being made available for public scrutiny, particularly as it relates to the Public Sector Equality Duty (PSED). The Regulations were immensely intrusive and restrictive.
51. The complainant argued it is of critical importance that the DHSC properly considered the impact that these restrictions would have on people with protected characteristics, who include some of the most vulnerable members of society.

"The reason why the PSED is so important is that it requires a public authority to give thought to the potential impact of a new policy which may appear to it to be neutral but which may turn out in fact to have a disproportionate impact on certain sections of the population" (R (Bridges) v Chief Constable of South Wales Police [2020] EWCA Civ 1058).

52. The complainant further argued there is an extremely strong public interest in the requested information being made available for public scrutiny, so that proper consideration can be given as to whether equalities law was complied with, and the rights of people with protected characteristics adequately safeguarded, in the context of the most severe mass restrictions on people's civil liberties in modern history. Without publication of the requested information there is simply no way for the public to be satisfied that there was compliance.
53. The complainant has notified the Equality and Human Rights Commission of the DHSC's refusal to publish the requested information, and their position is that: *"All public bodies should be in a position to demonstrate how they have met the PSED when making legal and policy decisions. Publication of information to this effect is important to demonstrate that the duty has been complied with and is also vital to facilitate effective scrutiny and promote further understanding of the duty."*
54. Thirdly, the requested information should already be in the public domain. The DHSC has a duty to publish the requested information, and it is in breach of that duty. Regulation 4 of The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 requires the DHSC to publish information annually demonstrating its compliance with the PSED. As far as the complainant is aware, DHSC last complied with this obligation in March 2019.

The Commissioner's decision

55. The Commissioner acknowledges the massive restrictions imposed by The Health Protection (Coronavirus, Restrictions) (England) Regulations and the impact on those with protected characteristics cannot be ignored.
56. It is clear that the Government was under a strong obligation to ensure that any measures introduced would not have a disproportionate impact on particular sections of the population.
57. However, the Commissioner also acknowledges that when the Regulations were introduced in March 2020 it was still early in the pandemic and there was little information available on which to base any EIAs. As pointed out by DHSC, equality impacts in areas such as working from home, had no precedent and no historic data points to work from, meaning the related assessment was more speculative, identifying broad areas of concern rather than specific impacts.
58. The Coronavirus Act 2020 itself developed policies for existing services and, consequently, the analytical groundwork had been laid previously. This meant that the policies introduced were more familiar, and the equality assessment documents more suitable for publication.
59. The Commissioner is not persuaded by the argument that the withheld information relates to finalised policy decisions as the withheld information will continue to feed into work to identify and address impacts on protected groups, thereby continuing to develop policy.
60. The Commissioner is satisfied that the documentation already published demonstrating compliance with the PSED regarding the introduction of the Coronavirus Act 2020 goes some way to addressing the public interest around the consideration of equality impacts.
61. Although she is mindful that the complainant is concerned DHSC has yet to publish its annual information demonstrating its compliance with the PSED, the Commissioner notes the 2019 report states:

"The specific duties in England commenced in September 2011 and require relevant public bodies to publish information to demonstrate their compliance with the Public Sector Equality Duty at least annually from January 2012, and to set and publish equality objectives at least every four years from April 2012."

This publication provides information on the delivery of equality objectives published in 2015. It explains how DHSC has complied to the Public Sector Equality Duty in delivering its services and functions in 2018-2019."

62. Therefore she considers that it is entirely probable that the next report was due on March 2020, the exact time the pandemic was beginning to have a serious global impact. Unsurprisingly this is likely to have caused Government and DHSC to refocus on the emerging crisis rather than attempting to comply with a reporting timetable.
63. The Commissioner is not quoting from any direct source on this matter, but rather, taking a common sense view in the circumstances, that usual activities would likely have been suspended or postponed.
64. Having considered all the circumstances of the case, the Commissioner is satisfied that the exemption is engaged. However given that the information should already be in the public domain by way of its annual 'reporting' of compliance there appears to be little justification for it being withheld.
65. DHSC stated several documents that include information relevant to the request are already in the public domain (para 30). Although this goes some way to satisfying the public interest, DHSC has not, in the Commissioner's view justified why the withheld information is more sensitive.
66. Furthermore, the Commissioner is not persuaded by the argument of the 'chilling effect'. Although it is generally accepted that there needs to be a full and frank exchange of views when formulating policy, by the time of the request the regulations had come into force, albeit only just.
67. It appears that the withheld assessments are those that fed into the regulations themselves and it is difficult to see how these will affect future policy making. Any future assessments would be based on the regulations in force and the circumstances at that time, and consequently, that would be the information feeding into any future policy decisions.
68. Based on all the above the Commissioner considers that the public interest rests in favour of disclosing the withheld information.

Right of appeal

69. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

70. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
71. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Duffy
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